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Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

LYNN M. PAULSEN,

Petitioner,

v.

BEYOND, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a company's belief that an employee is "too sick to return to work" evidences its perception that the employee is "substantially limited in a major life activity" and thus " disabled" under the Americans with Disabilities Act and this Court's Decision in *School Board of Nassau County v. Arline*? [1]

II. Whether an employer's specifically expressed belief that an employee is "to sick to return to work", because of possible cancer, creates a fact issue that the employer "regarded" the employee as "disabled" under the Americans With Disabilities Act?

III. Whether such a statement by an employee's supervisor, followed immediately thereafter by termination, creates a fact issue that such perception was a motivating factor in the termination?

IV. Whether, under this Court's decision in St. Mary's v. Hicks, a permissible inference of discrimination may be drawn from a plaintiff's prima facie case and "a suspicion of mendacity" as to the

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[1] (Quoted from the Fifth Circuit Opinion).

reasons advanced by the Defendant for termination, thus creating a fact issue?

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LYNN M. PAULSEN

BEYOND, INC.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Lynn M. Paulsen respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on June 18, 1996.

OPINIONS BELOW

The Opinion of the Court of Appeals is unreported. It is reproduced in the Appendix at page A-1. The Opinion of the District Court is also unreported. It is reproduced in the Appendix at page A-24.

JURISDICTION

The Judgment of the Court of Appeals was entered on June 18, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS

1. 42 U.S.C. § 12102(2) provides as follows:

> "(2) ***Disability***
>
> The term "disability" means, with respect to an individual -
>
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment."

2. 42 U.S.C. § 12112(a) provides as follows:

> "(a) ***General Rule***
>
> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."

3.. 29 CFR §1630.2(i) provides as follows:

> "(i) *Major Life Activities"* means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."

STATEMENT OF THE CASE

Petitioner Paulsen was employed by Beyond from September 1991 until October 11, 1993. "Beyond sold electronic mail software, and Paulsen served as a regional sales manager. In general, she sold Beyond's product within an eight-state region and helped her customers, as well as resellers, to use the product. Although her title was manager, Paulsen did not

supervise other sales employees; however, she did supervise an engineer who provided technical support to Paulsen and her customers. Of Beyond's seven regional sales managers, Paulsen was the only female.

Prior to her employment with Beyond, Paulsen had a form of cancer, which she believed was related to her mother's use during pregnancy of the drug diethylstilbestrol (DES). This had required removal approximately ten years before she began work with Beyond of, among other things, several of her reproductive organs. Believing this experience to be "a strong statement of her determination", Paulsen disclosed her previous condition to Beyond before being hired, including her inability to have children. On the other hand, Paulsen was in good health when hired."[1]

Beyond contended that it made a decision in April 1993 to terminate Paulsen because of performance issues, and it hired a search firm in June

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1 Quoted from Fifth Circuit Opinion, p. A-2)

to look for a "replacement" for her. In January 1993 however Paulsen had closed a major sale to Texas Instruments and it was strongly disputed whether it was Beyond's intention to terminate her or to move her into a higher level position to handle such large accounts. The search firm testified that, according to its understanding, the newly hired individual might have worked for Paulsen! This caused the Trial Court to note a fact issue as to Beyond's claim. The Court stated,

> "The only conflict in Beyond's evidence which the Court finds creates a fact issue, is the conflict in whether Moore (the newly hired employee) was to work with or replace Paulsen and whether she would be retained if her performance improved. While the Court finds that this creates a fact issue, the Court concludes that this is not a fact issue material to the decision in this case." (Opinion p. A-39)

Paulsen continued to work in her job until August 18, 1993 at which time she notified the company of medical problems which prevented her from working. She was absent continuously from

August 18th until the date of her termination on October 11th.

During the August - October 11 time frame, she had various written and verbal communications with her managers, in which she specifically:

1. advised them that she was too sick to work and might be required to have an operation;

2. applied for disability leave; and

3. had two conversations with both her old supervisor (Allen) and new supervisor (Guerin), in which they both expressed doubt as to her ability to return to work and asked questions about whether her illness might be a recurrence of her former cancer.

The last such conversation occurred with Mr. Guerin on October 8th in which he questioned her about her ability to work. She had called him to advise that, in fact, her doctor had now given her a clean bill of health and she would be able to return to work on Monday, October 11th. Guerin expressed his surprise at her ability to return to work and told her not to

report until they had further conversation. He then talked with his superior and they decided to terminate her and ask her to sign a "mutual separation agreement". When Guerin called her to tell her this, she expressed her surprise and disagreement. Thereafter, Paulsen filed a Charge with the EEOC alleging that her termination was because of her sex and because Beyond regarded her as disabled in violation of the Americans With Disabilities Act (**"ADA"**). In such Charge, Paulsen relied on the Regulations under the ADA that define "inability to work" as a "disability," and thus she contended that Beyond regarded her as disabled and made the decision to terminate her because it believed she was having a recurrence of cancer and would be unable to work.

Paulsen later filed suit and Defendant Beyond filed a Motion for Summary Judgment which was granted by the District Court as to both her sex and ADA discrimination claims.

I. Decision of the Trial Court

A. Paulsen's ADA Claim

The Trial Court basically found a lack of any evidence that connected Beyond's action in terminating her to its alleged belief that she had cancer.

Because Beyond had originally hired her knowing that she had a history of cancer (although she was in good health at the time that she was hired) the Trial Court found that Beyond was entitled to a "powerful inference" that Beyond would not terminate her because of a perception of a recurrence of her cancer. (Trial Court Opinion, p. A-51) The Trial Court thus dismissed the questioning and comments by Allen and Guerin about her cancer as being nothing more than personal and legitimate concerns for a co-employee's health -- specifically concluding that these comments did not evidence Beyond's "corporate concern." The Court argued:

> "This court refuses to find discriminatory intent from a basic humane concern expressed and acknowledged for another human being. The court is of the opinion that a contrary finding

> could have the effect of punishing even the most genuine and innocent concerns of people working in organizations and would result in a de-humanization of the workplace."

Having made all these "findings" and giving effect to the "powerful inference", the Court granted Defendant's Motion for Summary Judgment. (Trial Court Opinion p. A-41)

B. Paulsen's Sex Discrimination Claim

As to the sex discrimination claim, the Trial Court concluded that Paulsen had created a prima facie case but had not met the standard of proof required by the Fifth Circuit in *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955 (5th Cir. 1994) which sets forth a requirement that a plaintiff must not only show that the defendant's proffered explanations are false, "but additionally, that unlawful discrimination was the motivation". (The pretext-plus standard of proof.) (A-30)

II. **The Fifth Circuit's Appeal**

Paulsen timely appealed to the Fifth Circuit complaining:

1. That the "powerful inference" indulged by the Trial Court constituted the drawing of an inference in favor of the motion for summary judgment, contrary to numerous decision of this Court including *U.S. v. Diabold*, 369 U.S. 654, 82 S.Ct. 993 (1962) where it is stated:

> "On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion." (p. 994)

2. That the inference drawn by the Trial Court that the comments of Allen and Guerin were simply individual expressions of humane concern -- as distinguished from corporate concerns -- was likewise an improper inference in favor of the motion for summary judgment. (A-41)

3. That the issue of fact found to exist by the Trial Court precluded the granting of summary judgment to the Defendant because it raised the required issue of fact as to the truthfulness of the Defendant's explanation for the termination -- i.e., the evidence challenged whether Beyond had planned to promote her, not terminate her.

4. That the *Bodenheimer v. PPG Industries* standard of proof was not in compliance with this Court's decision in *St. Mary's v. Hicks*.

III. The Fifth Circuit's Decision

The Fifth Circuit never addressed the improper inferences indulged by the Trial Court[3] but found, as a

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[3] The Fifth Circuit also focused on the alleged failure of Paulsen to properly raise the perception of disability issue -- as distinguished from actual disability. It said, "Paulsen, most belatedly in her reply brief, claims ADA coverage only as to the Third Alternative, 'being regarded as having such an impairment.'" (5th Cir., A-14) This was said by the Fifth Circuit in spite of the fact that the District Court's opinion plainly states that this was the only ADA issue ever raised. It stated:

"In her deposition and in briefs to this Court, Paulsen admits that she is seeking ADA coverage only as a

matter of law, that Paulsen had wholly failed to show that she was protected by the ADA at all. It stated:

> "even further assuming that Guerin's inquiry could establish that Beyond treated Paulsen as if her present inability to return to work established that she was suffering a reoccurrence of that same cancer Paulsen presents no evidence that Beyond appreciated the gravity of her previous cancer in such a way that it believed it to have substantially limited a major life activity." (5th Cir., A-22) (Emphasis by the Court)

The Fifth Circuit then concluded "Paulsen simply does not establish, nor can we deduce in what way Beyond treated Paulsen as if she suffered from any illness that had the requisite limiting effects to trigger ADA coverage." (A-22) This statement was made immediately after the Court noted Guerin's expressed doubt about her ability to return to work! It quoted:

> "(3) ...Guerin's belief at the time, as described in his deposition, that Paulsen would be too sick to return to work." (A-21)

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person being regarded as having a disability because of her assertions that Beyond perceives her to be disabled." (Trial Court Opinion, p. A-43) (Emphasis added)

Obviously, the Fifth Circuit totally ignored the Regulations under the ADA which state that "inability to work" is a limitation of a "major life activity," and thus a "disability"! They provide:

> "*(i) Major Life Activities* means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." (Emphasis added) (Sec. 1630.2(i))

Thus, the proof that the Fifth Circuit sought as to a "major life activity" (ability to work) was noted by it (Guerin's testimony) on the immediately preceeding page, but went unrecognized or ignored! The Court simply overlooked or chose to ignore, that - "inability to work" is, by definition, a "major life activity."

IV. ARGUMENT AND AUTHORITIES

A. The ADA Claim.

The ADA provides that a person is disabled and protected if the person is "...regarded as having such an impairment." 42 U.S.C. § 12102(2)(c) This Court

examined the purpose of this identical language in *School Board of Nassau County, Fla v. Arline*, 107 S.Ct. 1123 (1987) p. 1126-1129, which arose under the Rehabilitation Act of 1973.

In such Opinion, the Court noted the adverse reaction and prejudices that employers had toward certain impairments -- cancer being one such impairment that was specifically discussed. (See fn. 13, p . 1129) That case makes clear that if Beyond believed that Paulsen's cancer would prevent her from working and terminated her for that reason, then she is limited in a "major life function", is "disabled", and has established a claim under the ADA. The Fifth Circuit simply failed to understand or overlooked that Beyond's perception is the test, according to *Arline*, and when the proof shows, as it did here, that Beyond regarded her as "too sick to work", she is protected under the ADA. The Fifth Circuit's Opinion plainly fails to follow this Court's decision in *Arline*.

The Fifth Circuit seemed to require proof of a more detailed nature about what tasks Beyond believed that she could not do. But, it makes no difference whether Beyond believed she could not walk, talk, or travel etc. -- its conclusion that she could no longer work is the "bottom line" and was the conclusion that caused it to act! This is precisely the type conduct the "regarded as disabled" portion of the ADA sought to prohibit -- as noted in detail in *Arline*.

In *Taylor v. U.S. Postal Service*, 946 F.2d 1214 (6th Cir. 1991), the Sixth Circuit took the proper approach, following *Arline*. It observed that "Congress was as concerned about the effects of an impairment on others as it was about its effect on the individual." (p. 1218) The effect of the impairment on Beyond was made clear by Guerin's comments and actions. The Trial Court understood this, but felt that there was not strong enough proof to overcome the "powerful inference" it created and indulged in favor of the Motion for Summary Judgment.

All that the ADA and *Arline* require is knowledge on the part of the company of such an impairment (or imagined impairment) that the company believes will prohibit the employee's ability to work and connecting proof of an adverse employment action taken because of such perception. In the present case, the company officials: (1) knew of her prior cancer; (2) verbally demonstrated their concern that her absence and problems were a recurrence thereof; (3) expressed doubt that she could return to work, and (4) promptly took action to terminate her for that reason.

This Court should summarily remand the case, noting this and that "inability to work" satisfies the definition of a "major life function" and of "disability" under the ADA and noting that when inferences are drawn against the Motion for Summary Judgment, fact questions exist requiring a trial.

B. The Sex Discrimination Claim

In upholding summary judgment on Paulsen's sex discrimination claim, the Trial Court and Fifth

Circuit applied the *Bodenheimer* standard of proof, which standard stems from a misunderstanding of *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993). In Hicks this court made plain that evidence of "mendacity" as to the Defendant's purported reason, combined with a prima facie case, would permit an inference of discrimination by the factfinder. In *Bodenheimer*, the Fifth Circuit required more proof than that and set forth a standard (known as pretext-plus) that, in effect, requires direct evidence of discrimination.

It requires proof: (1) that the defendant's reason is not the true reason, plus (2) an additional showing that sex (age, race, etc.), was the true reason. By requiring this additional evidence, the "pretext plus" standard overlooks the permissive inference of discrimination that remains from the prima facie case when the Defendant's story is shown to be false. This is a standard that cannot be satisfied without direct

evidence of discrimination. It caused one District Court to observe:

> "...it appears to the Court in light of *Bodenheimer* that absent a defendant stupid enough to make an outright admission of discrimination or a pattern of discrimination so obvious as to constitute evidence of discrimination - both of which are absent here - a plaintiff will be unable to survive summary judgment." Dailey v. Johnson & Johnson Consumer Products, Inc., 850 F. Supp. 549, 555 (N.D. Tex. 1994).

Most of the Circuit Courts have correctly read *Hicks* as rejecting the pretext plus standard, but the Fifth Circuit trudges merrily on, dismissing cases left and right on summary judgment, because the Plaintiffs can seldom satisfy this direct evidence standard. [4] See the discussion of the other Circuit Court's views in

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[4] "Pretext Plus" is all the more ridiculous because when direct evidence is available, the burden shifting analysis of *Hicks* becomes irrelevant. In cases where direct evidence is present, the burden of proof shifts to the Defendant under this Court's decision in *Price Waterhouse v. Hopkins*, 103 S.Ct. 1775 (1989).

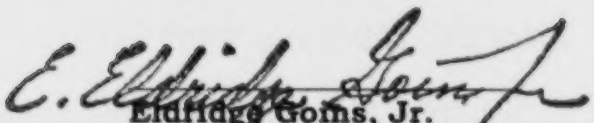
Walker v. NationsBank of Fla., N.A., 53 F.3d 1548 (11th Cir. 1995) at p. 1562.

This Court should grant review and resolve the conflict between the Fifth Circuit and the other Circuits in their reading of *St. Mary's v. Hicks.*

REASONS FOR GRANTING THE WRIT

The provisions of the ADA and its regulations, prohibiting discrimination because of a perception of disability, are unique and markedly different from other laws prohibiting discrimination. This Court dealt with them under the Rehabilitation Act in *Arline*, but the ADA has much broader application and they are still not understood by many lower Courts. The Fifth Circuit demonstrated its lack of understanding. Furthermore, the Fifth Circuit still does not correctly follow *St. Mary's Honor Center v. Hicks* and the conflict between the Circuits should be resolved by the granting of this Application.

Respectfully submitted,



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APPENDIX

* UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-40107

LYNN M. PAULSEN,

Plaintiff - Appellant,

versus

BEYOND, INC.,

Defendant - Appellee

Appeal from the United States District Court
for the Eastern District of Texas
(4:94-CV-22)

Before POLITZ, Chief Judge, WIENER and BARKSDALE, Circuit Judges. PER CURIAM:[1]

The critical issue in Lynn M. Paulsen's employment discrimination action is whether, under the Americans with Disabilities Act (ADA), 42 U.S.C. §

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* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

12102(2)(C), Paulsen was "regarded" by her employer, Beyond, Inc., "as having ... an impairment" (cancer) that "substantially limit[ed] one or more of [her] major life activities". For this challenge to the summary judgment awarded Beyond as to claimed violations of Title VII and the ADA, we conclude that a material fact issue does not exist for either claim, and that Beyond is entitled to judgment as a matter of law. Therefore, we AFFIRM.

I.

Paulsen was employed by Beyond from September 1991 until late October 1993. Beyond sold electronic mail software, and Paulsen served as a regional sales manager. In general, she sold Beyond's product within an eight-state region and helped her customers, as well as resellers, to use the product. Although her title was manager, Paulsen did not supervise other sales employees; however, she did supervise an engineer who provided technical support

to Paulsen and her customers. Of Beyond's seven regional sales managers, Paulsen was the only female.

Prior to her employment with Beyond, Paulsen had a form of cancer, which she believed was related to her mother's use during pregnancy of the drug diethylstilbestrol (DES). This had required removal approximately ten years before she began work with Beyond of, among other things, several of her reproductive organs. Believing this experience to be "a strong statement of her determination", Paulsen disclosed her previous condition to Beyond before being hired, including her inability to have children. On the other hand, Paulsen was in good health when hired.

As hereinafter discussed, Paulsen was absent from work from mid-August 1993 until her termination that October. While the summary judgment evidence is conflicting as to some aspects of that summer, it is apparent at the very least that, by this point, tensions were forming surrounding Paulsen's position at

Beyond. For example, while the evidence conflicts as to whether Paulsen was criticized directly by her supervisors, the uncontroverted deposition testimony of Craig Millard was that, as early as June, he had been hired to search for someone to fill Paulsen's role.

In mid-August, Paulsen informed her supervisor, Mike Allen, that she was ill, was unable to work, and was scheduled for medical tests. On September 10, she contacted Allen by e-mail to inform him of her medical status, stating that, although she required surgery to remove scar tissue obstructing her small intestine, the surgery would be postponed in order for her to attend her grandmother's funeral; that the rescheduled surgery would take place the following week; and that she anticipated only a three to five day recovery.

A week later, Paulsen contacted Beyond's chief financial officer by facsimile mail regarding her absence due to her hospitalization and the death of her family member in order to provide him with necessary

documentation for disability pay. And, at the end of September, Paulsen spoke with Allen by telephone to discuss both her health and the status of her business. According to Paulsen, during their conversation, Allen inquired, "You used to have cancer, didn't you? Aren't you afraid it's going to come back?"

On October 5, Beyond hired another person to be the regional sales manager for the territory Paulsen handled. In her deposition, Paulsen stated that she had heard a rumor that Allen "had an old buddy friend of his from [another] Corporation that he was thinking about hiring for [her] region". That Thursday, October 7, Paul Guerin telephoned Paulsen to inquire about her status, and asked Paulsen about her prior cancer and whether she was concerned that her current problems were related. (By October, Guerin had assumed the position that had been held by Mike Allen, and had become Paulsen's supervisor.) Paulsen did not return to work the next day (Friday), but spoke

again with Guerin by telephone to inform him that she was ready to return that Monday, October 11.

Guerin and Paulsen spoke again on Sunday, October 10; he informed her that Beyond did not want her to return to work and suggested that they negotiate a mutually acceptable separation. Paulsen asked Guerin to explain why Beyond wanted to terminate her employment, and he cited her below-goal sales figure expense reports, and tardy and inaccurate sales projection reports. Guerin asserted, but Paulsen denied, that these matters had been discussed previously with her by her former supervisor, Mike Allen.

No agreement was reached, and Paulsen filed this action in February 1994 under Title VII and the ADA. The district court granted Beyond's motion for summary judgment on each claim.

II.

Paulsen contests the summary judgment. It goes without saying that we review it *de novo,* applying the

same standard as the district court: the evidence, and reasonable inferences from it, are considered in the light most favorable to the nonmovant; and the "judgment is proper when no issue of material fact exists and the moving party is entitled to judgment as a matter of law". *Dutcher v. Ingalls Shipbuilding,* 53 F.3d 723, 725 (5th Cir. 1995); FED. R. CIV. P. 56 . " [T]he substantive law will identify which are material", and "[a] dispute about a material fact is 'genuine' ... if the evidence is such that a reasonable jury could return a verdict for the nonmoving party". *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

No authority need be cited for the rule that we consider only the summary judgment record that was before the district court. In that regard, Beyond moved in district court to strike much of Paulsen's summary judgment evidence on grounds that parts of her affidavit were based on facts of which she had no personal knowledge, or were inadmissible hearsay, or were conclusory, or conflicted with her deposition; and

that exhibits were not properly authenticated. The court granted the motion in part, and Paulsen challenges this ruling.

The court struck the following: (1) Paulsen's statements regarding employment negotiations with other employees as to which she had no personal knowledge; (*2*) her statement regarding her status as a national account manager, noting that it could not qualify as an admission of a party opponent because Paulsen failed to identify the declarant; (3) her recitation of statements made by former employees, which were hearsay; *(4)* notes on her sales meetings and the text of an e-mail message, the substance of which is duplicated elsewhere in the summary judgment evidence, because Paulsen failed to supply the needed facts to qualify documentary evidence under the hearsay rule; and (5) portions of her affidavit and that of a co-worker that contained conclusory statements. We need not determine whether tie court erred in striking this part of the record, because none

of that evidence is sufficient to create a material fact issue as to either claim.

A.

It is undisputed that Paulsen has satisfied her initial burden of presenting a prima facie case for a Title VII claim. At issue is whether she fails to satisfy her burden of creating a material fact issue that Beyond's explanation was not the real reason for her termination and that unlawful discrimination motivated Beyond. *See, Bodenheimer v. PPG Industries, Inc.*, 5 F .3d 955, 957 (5th Cir. 1994) .

As its basis for termination, Beyond relies upon (1) Paulsen's failure to achieve sales quotas; (2) her failure to properly and timely complete sales projection reports; (3) her failure to timely submit expense reports; (4) her inaccessibility to customers and supervisors; (5) her failure to return their telephone calls; and (6) customer complaints. And, Beyond asserts that Paulsen has not created a material fact issue as to the required discriminatory motive.

Paulsen contends that the following creates a material fact issue on motivation: (1) she was the only female regional sales manager; (2) she was ranked second in sales on a monthly report, yet was dismissed when those male sales managers below her were retained and not disciplined for low sales; (3) she was fired by, and replaced by, males; (4) her co-worker stated that Paulsen had been humiliated in a meeting in a manner the co-worker described as sexist; (5) early in her tenure with Beyond, it was unresponsive to her complaints regarding sexual harassment by another employee; and (6) two male employees were not fired, although they were away from work for extended periods due to illness. As discussed below, we agree with the district court that, on this record, a material fact issue does not exist as to whether Paulsen's gender was a factor in her dismissal.

That Paulsen is female and was replaced by a male merely establishes her prima facie case (which is

undisputed) and is insufficient to create a material fact issue on discriminatory motive.

Paulsen's contention regarding other salespeople not being disciplined is not borne out by the record. She admitted that one person was disciplined for low sales and that another, a regional sales manager of similar seniority, was also dismissed. Both persons out-sold Paulsen from January through August 1993. Two other sales managers, each of whom occupied the position for a shorter period than Paulsen, were fired for low sales, even though their sales were higher than Paulsen's at the time of their discharge.

There is no evidence linking Paulsen's being harassed by her fellow employee to her termination years after the resolution of the episode, and she admits that the incidents ceased after she complained to her supervisor, Mike Allen. Moreover, the employee who was the subject of the complaints was discharged.

The only evidence regarding allegedly sexist remarks made to Paulsen at a sales meeting is the

opinion of a former fellow employee that the comments were of that nature. Paulsen offered no evidence linking these remarks, alleged to predate her termination by a year, to her dismissal. This is insufficient to create a fact issue on discriminatory motive. *See Wilson v. Belmont Homes, Inc.*, 970 F.2d 53, 57 (5th Cir. 1992) (plaintiff failed to satisfy burden of proof on discriminatory motive when she presented evidence of employer comment that plaintiff's was "a man's job" but failed to tie comment to motive for firing).

The male employees whom Paulsen asserted were absent due to illness neither occupied regional sales manager positions as did Paulsen, nor did they suffer similar illnesses. Their experiences also do not suffice to create a fact issue regarding discriminatory motive. *See generally, Florence v. Frank,* 774 F. Supp. 1054 (N.D. Tex. 1991) (plaintiff failed to survive summary judgment on discrimination claim where he compared employer's treatment of him to treatment of

employee who suffered different injury because employees were not similarly situated).

While Paulsen offers facts that would suggest Beyond was pleased with her work (customer complements, Beyond's request that she conduct important meetings), these do not create a material fact issue that the real reason for her termination was her gender. As stated, summary judgment was proper as to the Title VII claim. *See generally, Rhodes v. Guiberson Oil Tools,* 75 F.3d 989, 994 (5th Cir. 1996) (en banc) (instructing that, in comparable area of ADEA law, plaintiff can avoid summary judgment if evidence taken as whole (1) creates fact issue as to whether employer's stated reasons actually motivated actions, and (2) creates reasonable inference that [gender] was a determinative factor in actions of which plaintiff complains).

B.

A person is "disabled" under the Americans with Disabilities Act, 42 U.S.C. § 12101, *et. seq.*, if she suffers any one of three alternatives:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102 (2).

Paulsen, most belatedly in her reply brief, claims ADA coverage only as to the third alternative, "being regarded as having such an impairment". As to the district court's conclusion that ADA coverage was lacking, Paulsen's opening brief on appeal does not adequately brief this point. While she does urge us at length to conclude that the district court improperly concluded that Beyond's inquiries about her condition were not sufficient to establish *discriminatory intent*,

Paulsen does not adequately brief whether those same inquiries, combined with other summary judgment evidence, were sufficient to establish that Beyond *regarded Paulsen as disabled.* Only in her reply brief does she finally address the failure to prove ADA coverage under the "regarded as" provision, saying only that (1) she did not claim to be disabled, but rather that she was perceived to be disabled; (2) that what was required to establish a prima facie case under this provision "created problems for the Trial Court"; and (3) that, in a "regarded as" case, typical standards do not apply. Needless to say, this discussion does little to frame a cogent issue for our consideration; and, on this basis alone, we could affirm summary judgment on the ADA claim. See FED. R. APP. P. 28(a)(6); *e.g., Weaver v. Puckett,* 896 F.2d 126, 128 (5th Cir.) (noting that Rule 28 requires that appellant's argument contain reasons and supporting authority appellant deserves relief requested, and holding that, because appellant failed

to argue point in body of brief, argument considered abandoned), *cert. denied*, 498 U. S . 966 (1990).

In any event, as the district court concluded, Paulsen fails to demonstrate that she is covered by this statutory provision because she offered no evidence of Beyond's "perception of the limiting effects" of her supposed recurrence of cancer. The EEOC regulations define "regarded as having such an impairment" as follows:

> (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such a limitation;
>
> (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
>
> (3) Has none of the impairments defined in paragraph (h)(l) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

29 C.F.R. § 1630.2(1).

Because Paulsen maintains that she did not have an "impairment" (did not have cancer), she must satisfy the regulation's third alternative: that Beyond "treated ... [her] as having a substantially limiting impairment". We agree with the district court that, to establish ADA coverage under this part, Paulsen must do far more than simply assert that Beyond believed she was suffering a recurrence of cancer. She must create a material fact issue that Beyond treated her as if the supposed cancer substantially limited a major life activity.

In its summary judgment motion, Beyond asserted that Paulsen _ to present a material fact issue as to whether she was "disabled" within the meaning of the ADA. In response to the motion, Paulsen addressed the "limiting effects" aspect of her claim with only a parenthetical, conclusory statement that "[c]ancer is an obvious disability - particularly where it has required

removal of important bodily organs and has limited various major life functions such as childbirth and urinary functions".

Obviously, this conclusory statement primarily describing a previous condition, without more, is insufficient to establish ADA coverage. Moreover, cancer is not *per se* a disability; rather, in individual cases, it may not substantially limit a major life activity. *See, Ellison v. Software Spectrum, Inc.*, ___ F. 3d ___ (5th Cir. 1996), 1996 WL 284969 (finding plaintiff's cancer did not substantially limit any major life activity and thus was not a disability).

As record support for the conclusory statement that "[c]ancer is an obvious disability - particularly where it has required removal of important bodily organs and has limited various major life functions such as childbirth and urinary functions", Paulsen cites to the following portion of her affidavit:

> During the years 1978 through 1983, I had many organs removed because of a diagnosis of cancer. My mother had taken DES during her pregnancy with me to

> prevent miscarriage, but this drug was later found to cause clear-cell carcinoma polyps and other bad side effects to offspring. I had the following organs removed: Fallopian Tubes, Ovaries, Uterus, Appendix, Gallbladder, parts of muscle, liver, and abdomen wall. This resulted in my being unable to bear children. I also have problems with urinary incontinence, and I have no natural hormones which results in an inability to regulate my body temperature, among other things.

As hereinafter discussed, this evidence is insufficient to satisfy Paulsen's burden under Rule 56 and the law of our circuit.

As the party who did not bear the burden of proof at trial on coverage under the ADA, Beyond was not required to produce evidence negating the existence of a material fact. Instead, its burden was to point out the absence of evidence supporting Paulsen's case. *E.g., Latimer v. Smithkline & French Laboratories*, 919 F.2d 301, 303 (5th Cir. 1990). Accordingly, once Beyond submitted a properly supported summary judgment motion, in which it

pointed, *inter alia,* to the lack of evidence supporting Paulsen's "regarded as" contention, Paulsen was required to designate the specific facts in the record that created a material fact issue.

Assuming *arguendo* that Beyond believed that Paulsen had cancer, Paulsen did not present any evidence that Beyond *treated her* as having cancer *that substantially limited a major life activity.* Standing alone, the above-quoted portion of her affidavit, upon which she relies for her claimed ADA coverage, does not address this critical point. Nor does Paulsen explain how any of the record evidence created a material fact issue on whether Beyond so treated her. Nor are we required to attempt to weave evidence together for her. Rule 56 does not impose upon us a duty to survey the entire record in search of evidence to support the nonmovant's position. *See Forsyth v. Barr, 19* F.3d 1527, 1537 (5th Cir.) (quoting *Skotak v. Tenneco Resins, Inc.,* 953 F.2d 909, 915 n.7 (5th Cir.),

cert. denied, 506 U.S. 832 (1992)), *cert. denied,* _ U.S. _, 115 S. Ct; 98 (1994).

Alternatively, even attempting to piece together the evidence to create the requisite material fact issue, we are unable to do so. The only record evidence that we can hypothesize to be even arguably relevant to whether Beyond treated Paulsen as having cancer that substantially limited any of her major life activities was: (1) Guerin's admissions in his deposition that he questioned Paulsen about whether she was concerned that the health problems she experienced in 1993 were in some way related to her previous cancer; (2) Paulsen's descriptions in her affidavit of the sometimes severe symptoms of her prior cancer; and (3) Guerin's belief at the time, as he described in his deposition, that Paulsen would be too sick to return to work.

As stated, to create a material fact issue on this point, the evidence must demonstrate that Beyond treated Paulsen, not merely as if she had cancer, but as if she had cancer that substantially limited a major

life activity. *Even assuming* that the problems caused by Paulsen's prior cancer, as described by Paulsen in her affidavit, would suffice to demonstrate the **limitation** of a major life activity, *and even further assuming* that Guerin's inquiry could establish that Beyond treated Paulsen as if her present inability to return to work established that she was suffering a recurrence of *that same cancer,* Paulsen presents no evidence that Beyond appreciated the gravity of her previous cancer in such a way that it believed it to have *substantially limited a major life activity.*

Neither logic nor the ADA compel the conclusion that one who believes a person to be suffering from cancer must believe *ipso facto* that the cancer substantially limits a major life activity. Paulsen simply does not establish, nor can we deduce, in what way Beyond treated Paulsen as if she suffered from any illness that had the requisite limiting effects to trigger ADA coverage. Because Paulsen failed to establish a

material fact issue as to ADA coverage, summary judgment was proper on that claim.

III.

or the foregoing reasons, the judgment is ***AFFIRMED***.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

LYNN M. PAULSEN,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	**4:94CV22**
	§	
BEYOND, INC.,	§	
	§	
Defendant.	§	

MEMORANDUM OPINION AND ORDER

Before the Court is Defendant's Motion for Summary Judgment. The Court having reviewed the motion, response, replies, and admissible summary judgment evidence is of the opinion that such .motion should be **GRANTED**.

INTRODUCTION

This is an employment discrimination suit brought under Title VII alleging sex discrimination and alleging discrimination under the Americans with Disabilities Act (the "**ADA**"), 42 U.S.C. § 12102-213

(West 1994). Plaintiff, Lynn M. Paulsen ("**Paulsen**"), was hired by the Defendant, Beyond, Inc. ("**Beyond**"), in September 1991, as its Regional Sales Manager in Dallas, Texas. Beyond develops and markets electronic mail programs for use in office computer systems. Paulsen's job was to market Beyond's products to clients within her region and to assist in servicing those clients once Beyond's product was in use. Paulsen's other duties included maintaining expense reports, pipeline reports (sales forecasts), and conducting informational presentations to clients and fellow salespersons.

Beyond terminated Paulsen on or about October 10, 1993. Beyond cited as their reasons for termination, Paulsen's: (1) failure to achieve sales quotas; (2) failure to complete pipeline reports properly and on time; (3) failure to submit expense reports on time; (4) failure to return phone calls from customers and supervisors; (5) complaints by customers; and (6) inaccessibility to customers and supervisors. Paulsen

filed suit following her discharge arguing that her termination was based upon both her sex and Beyond's perception of her as having a disability because of a pre-employment battle with cancer and her later complications. Beyond now files a motion for summary judgment alleging that Paulsen does not qualify for coverage under the ADA and that she cannot refute their legitimate nondiscriminatory reasons for termination under either her sex discrimination or ADA claim.

SUMMARY JUDGMENT STANDARD

The granting of summary judgment is proper if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The trial court must resolve all reasonable doubts in favor of the party opposing the motion. *Casey Enterprises, Inc. v. Am. Hardware Mut. Ins. Co.*, 655 F. 2d 598, 602 (5th Cir. 1981)(citations omitted). The party seeking summary judgment carries the burden of demonstrating that

there is no actual dispute as to any material fact in the case. This burden, however, does not require the moving party to produce evidence showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 106 S.Ct. 2548, 2554 (1986). The moving party satisfies its burden by "pointing out to the district court . . . that there is an absence of evidence to support the nonmoving party's case." *Id.*

Once the moving party has satisfied its burden, the nonmovant must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). If the nonmovant fails to set forth specific facts in support of allegations essential to that party's claim and on which that party will bear the burden of proof, then summary judgment will be appropriate. *Celotex,* 106 S.Ct. at 2552-53. Even if the nonmovant brings forth evidence in support of its allegations, summary judgment will be appropriate "unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely

colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2511 (1986)(citations omitted).

TITLE VII FRAMEWORK

The basic allocation of burdens in a Title VII case is set out in the Supreme Court's opinions in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) and *St. Mary's Honor Ctr. v. Hicks*, -- *U.S.* --, 113 S.Ct. 2742, 2747-48, 125 L.Ed.2d 407 (1993). The plaintiff must first bear the initial burden of establishing, by facts sufficient to warrant recovery, a prima facie case of unlawful discrimination. *Armstrong v. City of Dallas*, 997 F.2d 62, 65 (5th Cir. 1993); *see St. Mary's Honor Ctr.*, 113 S.Ct. at 2746-47. Second, if the plaintiff succeeds in proving a prima facie case, the burden of production is on the defendant, "to articulate some legitimate, nondiscriminatory reason" explaining the defendant's complained-of conduct. *McDonnell Douglas*, 93 S.Ct. at 1824. Should the defendant

articulate such reasons, the plaintiff must then make a showing sufficient for a jury to find that the reasons given were not the true motivations "for the employment decision *and* that unlawful discrimination was." *Bodenheimer v. PPG Industries, Inc.*, 955, 957 (5th Cir. 1994)(emphasis in original); *Barrow v. New Orleans S.S. Ass'n,* 10 F.3d 292, 298 n.22 (5th Cir. 1994); *see St. Mary's Honor Ctr.,* 113 S.Ct. at 2747. Should the plaintiff fail to satisfy his burdens of proof on either the first or third step, his claim fails as a matter of law. *See St. Mary's Honor Ctr.,* 113 S.Ct. at 2748.

A. **Paulsen's Sex Discrimination Claim under Title VII**

In order to establish a prima facie case under Title VII for sex discrimination, a plaintiff must show that (1) she is a member of a protected class, (2) she was qualified for the position she held, (3) she was discharged from that position, and (4) the position remained and was ultimately filled with a member of

the opposite sex. *See St. Mary's Honor Ctr.*, 113 S.Ct. at 2747. Plaintiff bears the initial burden of adducing evidence giving rise to an inference of unlawful discrimination. *See Texas Dep't of Community Affairs v. Burdine*, 101 S.Ct. 1089, 1093-94 (1981).

The parties agree, and the Court finds that Paulsen has satisfied her initial burden of showing a prima facie case and as previously discussed, Beyond has articulated several legitimate nondiscriminatory reason for its employment decision. Accordingly, the Court now turns to the third step in the Title VII analysis.

In the third step, the plaintiff bears a two part burden of proving not only that the proffered explanations are not the real reasons behind the employment decision, but additionally, that unlawful discrimination was the motivation. *Bodenheimer*, 5 F.3d at 957. Beyond argues, and the Court agrees, that while Paulsen may have created some doubt as to some of Beyond's explanations, she has presented the

Court with insufficient evidence to satisfy her burden under *Bodenheimer*, and show unlawful discrimination.

Paulsen directs the Court to several specific facts she contends refute Beyond's explanations and show evidence of unlawful discrimination. Specifically, Paulsen shows that: (1) Beyond praised her sales efforts both to her personally and to others in September and December of 1992; (2) Paulsen closed a sale to Texas Instruments in January 1993, worth $175,000 in up-front money, which constituted a small portion of the entire sale; (3) Beyond received a complimentary letter from one of Paulsen's largest accounts on April 15, 1993; (4) Paulsen ranked third out of seven in sales results through April 30, 1993; (5) In May 1993, Paulsen made a presentation on how to sell large corporate accounts for Beyond's salespersons; (6) On June 3, 1993, Paulsen made a sales presentation to Exxon; (7) On June 23, 1993, Mike Allen, Paulsen's supervisor, came to Dallas and

visited with Paulsen concerning job related issues;[2] (8) Paulsen made sales calls to two large clients in Denver Colorado in August 1993; (9) In September 1993, Paul Guerin took over Mike Allen's position and Mike Allen became responsible for large corporate accounts, a position Paulsen claims was intended for her; (10) During October, Paulsen informed Beyond she could return to work and Beyond told her to wait and then told her that they wished to mutually separate; (11) Paulsen maintains that early in her association with Beyond, the company was unresponsive to her claims that she was being sexually harassed by another employee; (12) Paulsen was the only female account manager in the company; (13) Other managers who ranked below Paulsen on the April 30th report were

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[2] The allegations concerning what was actually done during Mr. Allen's visit are in conflict. Beyond contends that during his visit, Allen went over a list of Paulsen's deficiencies with her and placed her on probation. Paulsen claims that she and Allen made sales calls together and that he gave her some ideas on how to close the sales she was working on. Paulsen denies that Allen ever went over a list of deficiencies or placed her on probation.

either not disciplined, or if disciplined, were not comparable to Paulsen in seniority.

Paulsen submits the affidavit of Andrew Guy, a former Beyond employee, to support her claims. Guy's affidavit recounts a sales meeting during which Chuck Digate, one of Paulsen's superiors "put her down" in front of the meeting. Guy stated that in his opinion, the remark and conduct were sexist.

Paulsen further alleges that Beyond's version of events conflict and thus, give rise to a fact issue. Paulsen also asserts that Beyond's search for, negotiations with, and ultimate hiring of Roger Moore constitutes evidence of pretext and sexual discrimination. Finally, Paulsen contends that because of the length of time needed for sales to close in Beyond's line of business, that her sales figures do not accurately reflect the work she has performed.

The Court finds that while Paulsen's version of the facts in this case may call into question the strength of some of Beyond's proffered explanations,

none of Paulsen's facts show that sex was a factor in Beyond's decision to terminate her. Paulsen's sales efforts and both Beyond's and Texas Instruments' praise of those efforts are unpersuasive. Both the praise and the April 30, 1993 sales report ranking reflect work done in 1992 on primarily one account, Texas Instruments ("TI"). As Beyond contends, when Paulsen's sales figures are broken down, it is readily apparent that the closing of the TI sale in January 1993 is the reason for her sales ranking for that quarter. When examined on a monthly basis, it is also apparent that Paulsen was failing to meet monthly quotas and despite being well into 1993, was far behind her annual sales quota for the year.[3]

Paulsen's deposition discredits her arguments concerning Beyond's failure to discipline her coworkers

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[3] The Court notes that while Paulsen argues that sales closings in Beyond's industry take a long time, the coworkers she was compared with also worked under these conditions. Moreover, the sales procedures of a company and their effect on the employee's sales figures will not create a fact issue in an employment discrimination case. *Rhodes v. Guiberson Oil Tools*, 39 F.3d. 1044, 1047 (5th Cir. 1994).

who were similarly situated. In her deposition, Paulsen admits that both Michael Sweeney and Adam Gouda, who were Regional Sales Managers for Beyond, were terminated for not meeting sales quota-A. The evidence shows that both Sweeney and Gouda were outperforming Paulsen. Paulsen maintains, however, that both men had less experience than her and are not comparable.

Paulsen further testified that David Weinberg was placed on probation for low sales. Paulsen also admits that Tom Venable was discharged for the same reason. Both Weinberg and Venable were Regional Sales Managers with seniority comparable to Paulsen. The Court finds Paulsen's contentions regarding Beyond's disciplining of other employees unpersuasive. *See Smith v. Wal-Mart Stores (No.* 471), 891 F.2d 1177, 1180 (5th Cir. 1990)(holding that employees must be in nearly identical situations with different results for a disparate treatment claim to succeed); *Kendall v. Block, 821* F.2d 1142, 1147 (5th Cir. 1987)(holding

that employees with differing performance ratings were not similarly situated). The Court concludes that although Weinberg was not discharged, he was disciplined on the same basis as Paulsen and no evidence exists that he suffered from other performance complaints similar to Paulsen's. The Court further finds that the evidence of other terminations based on sales performances lends some support to Beyond's explanations for its termination of Paulsen.

Paulsen's arguments concerning her sales efforts after May 1993 are likewise unpersuasive. Paulsen maintains that Beyond's allowing her to continue to make sales presentations and presentations to her fellow workers raises a fact issue regarding her termination. The Court finds, however, that Beyond's actions were consistent with allowing an employee to continue in their position until a suitable replacement is found and does not create a genuine issue of material fact on whether or not Beyond

sexually discriminated against Paulsen in their employment decision.[4]

Paulsen further alleges that Beyond was unresponsive to her claims of sexual harassment by a fellow employee. Paulsen, however, admitted in her deposition that once she reported the conduct to her supervisor, Mike Allen, that there were no further incidents. The evidence shows that Beyond terminated the employee. Moreover, Paulsen provides no evidence linking this event with her termination. *See Silverstein v. Metroplex Communications, Inc.*, 678 F. Supp. 863, 869-70 (S.D. Fla. 1988)(finding that for sexual harassment to support a Title VII claim, their must be some evidence linking the harassing event with the employment decision).

Paulsen's argument concerning the fact that she was the only female sales manager at Beyond is also

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[4] The Court notes that this is confirmed in the depositions of Paulsen's superiors where they consistently state that Paulsen was retained to avoid any disruption in the TI account and to allow her a chance to improve.

unpersuasive. While the Court finds that this fact aids Paulsen in establishing her prima facie case, the Court is of the opinion that this fact does not undermine any of Beyond's proffered explanations for its employment decision.

The Court finds the affidavit of Andrew Guy unpersuasive. Mr. Guy's affidavit provides only a general account of the alleged "put down." Moreover, it is only Mr. Guy's opinion that the conduct and/or remark of Digate was sexist. The subjective beliefs and opinions of former employees alone, do not constitute appropriate summary judgment evidence sufficient to raise a fact issue. Thornton v. Neiman Marcus, 850 F. Supp. 538, 544 (N.D. Tex. 1994).

Finally, the Court finds that neither Beyond's negotiations with Moore, nor the alleged "conflicting versions" of the events leading to Paulsen's termination provide this Court with sufficient evidence to find that Beyond's explanations were pretext for sexual discrimination. The negotiations with and hiring of

Moore are completely irrelevant to the issue of pretext and discrimination by Beyond against Paulsen. The Court finds that Paulsen's argument concerning Moore is really more appropriately made regarding her prima facia case, which both parties concede has been established.

The only conflict in Beyond's evidence which the Court finds creates a fact issue, is the conflict in whether Moore was to work with or replace Paulsen and whether she would be retained if her performance improved. While the Court finds that this creates a fact issue, the Court concludes that this is not a fact issue material to the decision in this case. When the facts are viewed as Paulsen alleges, the fact issue created here does not show evidence of her sex being a factor in the decision to terminate her. The Courts inquiry in a Title VII case is not as to the merits and procedure of termination, but is rather an inquiry into motive. *See Wilson v. Belmont Homes, Inc.*, 970 F.2d 53, 57 (5th

Cir. 1992). The Court finds that Paulsen has failed to provide any evidence in that regard.

The Court finds that Paulsen has not met her burden under Title VII, and no genuine issues of material fact exist as to whether or not Beyond discriminated against her on the basis of her sex. Accordingly, the Court is of the opinion that Beyond's summary judgment motion should be granted as it relates to Paulsen's sex discrimination claim under Title VII.

B. **Paulsen's Claim under the Americans with Disabilities Act**

1. **Direct Evidence of Discrimination under the ADA**

Paulsen first argues that she has presented this Court with direct evidence that Beyond's perception of her as having a disability was a factor in her termination, and therefore, she is entitled to the mixed-motive framework of proof outlined in *Price Waterhouse v. Hopkins, 490 U.S.* 228 (1989).

Paulsen maintains that Mr. Guerin testified in his deposition that the Company was concerned over Paulsen's health. Having reviewed Guerin's deposition, the Court cannot find that Guerin's testimony represents anything other than a personal and legitimate concern over an employee's health and well-being.[5] There was no testimony concerning the Company's concern or that during the process of making the decision to terminate Paulsen that concern over her health was a factor. This Court refuses to find discriminatory intent from a basic humane concern expressed and acknowledged for another human being. The Court is of the opinion that a contrary finding could have the effect of punishing even the most genuine and innocent concerns of people working in organizations and would result in the dehumanization of the work place.

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[5] The Court finds that when taken in context, Guerin's statement regarding the concern of others was a reference to a general concern among those who worked closely with Paulsen and was not a reference to a corporate concern.

2. **A Prima Facie Case Under the ADA**

Because Paulsen presents no direct evidence of discrimination in violation of the ADA, Paulsen's ADA claim is analyzed under the basic Title VII framework. *Tyndall v. National Educ. Ctrs., Inc.*, F.3d 209 (4th Cir. 1994). In order to state a *prima facie* case of employment discrimination under the ADA, a plaintiff must show that: (1) she has a disability; (2) she was qualified for her job; (3) the defendant's termination of plaintiff's employment constitutes unlawful discrimination. *Id.* at 212-13. Beyond's first contention is that Paulsen does not present a prima facie case under the ADA. Specifically, Beyond argues that Paulsen does not meet the statutory requirements to be considered "disabled" under the ADA.

The ADA defines a "disability" as "(i) a physical or mental impairment that substantially limits one or more major life activities; (ii) having record of such an impairment; or (iii) being regarded as having such an impairment." 42 U.S.C. § 12102(2). In her deposition

and in briefs to this Court, Paulsen admits that she is seeking ADA coverage only as a person being regarded as having a disability because of her assertions that Beyond perceives her to be disabled. An individual may satisfy the "'being regarded as having such an impairment" by showing that the individual has an impairment that is not substantially limiting, but is perceived by the employer as such an impairment. AMERICANS WITH DISABILITIES ACT OF 1990, EEOC TECHNICAL ASSISTANCE MANUAL AND RESOURCE DIRECTORY, (1992)(hereinafter EEOC TECH. MANUAL).

In order to qualify as an individual perceived as disabled, the employee must show evidence that she has received different treatment by the employer based upon a misconception of the limitations caused by her impairment. EEOC TECH. MANUAL at B-15.[6] An employee may also qualify as being perceived as

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[6] The EEOC TECH Manual gives as an example of perception of impairment, the situation where an employee has controlled high blood pressure that is not substantially limiting, but the employer assigns the employee to less strenuous work because of unsubstantiated fears that the individual will suffer a heart attack if he continues to perform strenuous work. *Id.* at B-15.

disabled if she can show that the employer took employment action based on a myth, fear, or stereotype in regards to the limiting effects of her impairment. *Id.*

The Court finds that Paulsen does not qualify as an individual who was perceived as disabled by her employer in making its employment decisions. Paulsen has produced no evidence at this time showing that Beyond took action based on a perception of the limiting effects of her past cancer, its possible recurrence, or its after effects. Because the Court is without such proof, the Court concludes that Paulsen cannot satisfy her burden of proving a prima facie case under the ADA. Moreover, the Court further concludes that if Paulsen could show a prima facie case, summary judgment would still be appropriate because as discussed below, Paulsen cannot meet her burden under *Bodenheimer* and show evidence of pretext and unlawful discrimination.

In response to Paulsen's allegations regarding disability discrimination, Beyond offers the same legitimate nondiscriminatory explanations for its employment decision as were discussed by the Court in the preceding sections. Thus, the Court now focuses its attention on Paulsen's evidence allegedly showing that Beyond's explanations are pretext for an employment decision made with discriminatory intent.

Paulsen offers the same facts as alleged and discussed by the Court in granting summary judgment on Paulsen's sex discrimination claim. Additionally, however, Paulsen offers four additional facts for the Court's consideration. Specifically, Paulsen presents evidence that (1) both Paul Guerin and Mike Allen inquired about her prior cancer and whether she was concerned about a recurrence; (2) she was on short-term disability at the time she was discharged; (3) Beyond failed to provide assistance to her during her leave of absence; and (4) male employees went on disability leave and were not terminated.

The Court is of the opinion that Paulsen did not carry her burden of producing evidence that Beyond's reasons for termination were untrue and that Paulsen's disability was a factor in Beyond's employment decision. For the reasons discussed in the Court's analysis of her sex discrimination claim, the Court finds that the facts previously offered fail to raise a genuine issue of material fact as to whether her disability was a factor in Beyond's decision to terminate her. The Court now focuses its attention on the new facts urged by Paulsen.

Paulsen argues that both Allen's and Guerin's inquiries regarding concerns of her cancer's recurrence constitute evidence that her disability was a factor in the decision to terminate her.[7] After examining the

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[7]The Court wishes to note specifically the objected to comments according to Paulsen's deposition. When asked what comments she based her belief that she was discriminated against, Paulsen responded: "Specifically, 'You used to have cancer, didn't you?' by Mike Allen and Mr. Guerin" (Paulsen Deposition p. 288). One page later, the following testimony was given:

Q. Okay. Let's go back to your first fact, if you will. You stated that Mr. Allen and Mr. Guerin said, quote, You used to have cancer, didn't you, end of quote.

A. Yes.

Q. Is that correct?

A. That is correct.

Q. All right, when did Mr. Allen make that remark?

* * *

A. In late September, the last day of September when I talked to Mr. Mike Allen about the seriousness of my illness, the steps that I was taking in regards to feeling better, what was happening in regards to my business, general business issues, Mike Allen stated to me you didn't have -- "You used to have cancer didn't you? Aren't you afraid it's going to come back?" (Paulsen Deposition p. 289).

Later, Paulsen responded to questions regarding Guerin's comment:

Q. You just refer to the supervisor who terminated you, correct?

A. My immediate supervisor, yes.

statements and the context in which they were made, the Court cannot find that either inquiry was more than a general inquiry regarding her general welfare.[8] "The civil rights laws prohibit discrimination, not discussion." *Tyndall,* 31 F.3d at 215 (holding that an employer's general inquiries into an employee's health and her symptoms or conditions did not constitute evidence of discriminatory motive in her termination). The Court is of the opinion that to find otherwise would chill even the most basic and innocent inquiries into

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> Q. Okay. And the comment that Mr. Guerin made to you about your condition was, quote, didn't you have cancer in the past? Aren't you worried it will occur in the future or come back or something to that effect, correct?
>
> A. You used to have cancer didn't you? Aren't you afraid it is going to come back?
>
> Q. That was it, correct?
>
> A. Yes.
>
> (Paulsen Deposition p. 659-60).

[8] The Court notes that there is no evidence that either Allen or Guerin pursued any further inquiries into Paulsen's condition. Moreover, the Court notes that there were no statements made regarding whether or not Paulsen could or should continue working with her condition.

an employee's well-being. Moreover, the comments and their timing appear completely appropriate when it is considered that at about the time of these inquiries, Paulsen submitted a disability request to Beyond's CFO without indicating when she thought she could or would return to work.

Paulsen's argument concerning her termination while on disability leave is also unavailing. Beyond argues, and the Court agrees, that Paulsen was not actually fired until she announced she had recovered and was ready to return to work. Moreover, Beyond had contacted a recruiter months prior to Paulsen's taking disability leave. Contrary to Paulsen's assertions, the timing of the actual termination appears less discriminatory because of the fact that although Paulsen's sales figures were below quota for an extensive period of time, Beyond waited until after Paulsen believed she was well to offer her a separation agreement. The Court cannot find a discriminatory

animus from the timing of the termination in this situation.

Paulsen next contends that discriminatory intent may be found from Beyond's failure to provide her with assistance during her time of disability. Specifically, Paulsen contends that Beyond did not respond to her request for additional personnel to help maintain her territory during her disability leave. The Court finds this argument unpersuasive. The ADA does not require that an employer provide replacements to fill-in for disabled employees. *See e.g.* Johnston v. *Morrison, Inc.*, 849 F. Supp. 777, 779 (N.D. Ala. 1994). Moreover, the Court notes that Paulsen stated in her deposition that she did not make such a request until after she took her leave which would have been sometime in August. Beyond, however, has cited as its reasons for her termination, her sales record prior to that time when she was disabled. Thus, the Court concludes that Beyond's actions in this regard are irrelevant as evidence of pretext and/or discrimination.

Finally, Paulsen argues that other employees went on disability leave and were not fired. As noted above, for evidence of disparate treatment to raise a fact issue, the employees must be similarly situated. *See Smith,* 891 F.2d at 1180; *Kendall,* 821 F.2d at 1147 There is no evidence that the employees who were retained following their period of disability had performance problems similar to those experienced by Paulsen. Moreover, the evidence does show that the employee Paulsen refers to were not comparable to Paulsen in position or seniority. The Court finds Paulsen's arguments on this point are unavailing.

Finally, Beyond maintains, and the Court agrees, that where the employer hires an employee with knowledge of her disability, a powerful inference is presented that discrimination did not play a part in the decision to terminate the employee. *See Tyndall,* 31 F.3d at 214-15. Paulsen admitted in her deposition that not only did she make Beyond aware of her prior cancerous condition and its accompanying difficulties,

she actually emphasized it as an event showing her strength and determination. Because Paulsen has failed to carry her burden under *Bodenheimer* and because the Court finds that Beyond is entitled to an inference of non-discrimination, the Court is of the opinion that Beyond's motion for summary judgment as it relates to Paulsen's ADA claim should be granted.

C. **Beyond's Motion on Damages**

Beyond contends that compensatory and punitive damages in this case are limited by 42 U.S.C. § 1981a. Because the Court is of the opinion that summary judgment is appropriate as to all of Paulsen's claims, the Court chooses not to address Beyond's arguments on the damages issue.

CONCLUSION

For the aforementioned reasons, the Court determines that Defendant's Motion for Summary Judgment should be **GRANTED**.

IT IS SO ORDERED.

Signed this ____ day of January, 1995.

_____

UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
F I L E D
OCT 15 1996
CLERK

No. 96-400

In The

Supreme Court of the United States

October Term, 1996

LYNN M. PAULSEN,

Petitioner,

vs.

BEYOND, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondent Beyond, Inc. objects to Petitioner's Questions Presented for Review on the basis that they are argumentative, repetitive, and are improperly expressed in a manner that mischaracterizes the facts of the case. Respondent therefore respectfully submits that the Questions Presented for Review in the Petition should read as follows:

1. Did the Fifth Circuit err in holding that Petitioner failed to create a fact issue that she is "disabled" under the Americans with Disabilities Act?

2. Does the Fifth Circuit's requirement that a Title VII plaintiff must, to avoid summary judgment, create a material fact issue, not only that the employer's explanation for the employment action was false, but also that the employer intentionally discriminated against the plaintiff, conflict with this Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993)?

LIST OF PARTIES

The Petitioner is Lynn M. Paulsen.

The Respondent is Beyond, Inc. Banyan Systems Incorporated is the successor-in-interest to Beyond, Inc. Nihon Banyan Systems is a non-wholly owned subsidiary of Banyan Systems Incorporated. There are no other parent companies or non-wholly owned subsidiaries.

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APPENDIX

Appendix A — Relevant Regulations 1a

TO THE UNITED STATES SUPREME COURT:

BEYOND, INC. ("Beyond") files this Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, asking this Court to deny Lynn M. Paulsen's ("Paulsen") Petition for Writ of Certiorari ("Petition") to review the judgment of the United States Court of Appeals for the Fifth Circuit issued on June 18, 1996. In support of this request, Beyond respectfully shows the Court as follows:

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the decision of the United States Court of Appeals for the Fifth Circuit entered on June 18, 1996.

STATUTORY AND REGULATORY PROVISIONS

In addition to the statutory provisions set forth in the Petition, the following regulations are relevant: (a) 29 C.F.R. § 1630.2(l)(3); (b) 29 C.F.R. § 1630.2(j)(2); and (c) 29 C.F.R. § 1630.2(j)(3). The text of the regulations are set forth in the Appendix hereto.

STATEMENT OF THE CASE

Beyond objects to Paulsen's statement of the decisions of the District Court and the Court of Appeals, in that it is argumentative and selectively refers to the courts' reasons for their decisions. The opinions of the District Court (Petition App. A-24 - A-53) and the Court of Appeals (Petition App. A-1 - A-23), which are reprinted in their entirety in the Appendix to the Petition, should be consulted for the reasons supporting their respective decisions. Beyond respectfully submits the

following statement of the Course of Proceedings and Disposition of the Case Below:

A. Course of Proceedings and Disposition of the Case Below.

Paulsen filed her Original Complaint, alleging sex and disability discrimination, in the United States District Court for the Eastern District of Texas, Sherman Division, on February 16, 1994. (R. 1-6). On October 17, 1994, Beyond filed its Motion for Summary Judgment. Paulsen filed her Response and Brief in Opposition to Beyond's Motion for Summary Judgment on November 3, 1994. (R. 636-59).

On November 17, 1994, Beyond filed its Reply Brief in Support of its Motion for Summary Judgment and its Objections and Motion to Strike Summary Judgment Evidence and Supporting Memorandum. (R. 811-20, 922-36). On November 30, 1994, Paulsen filed her Response to Beyond's Reply Brief and her Response to Beyond's Objections and Motion to Strike. (R. 937-42, 943-50). On January 11, 1995, the District Court granted in part and denied in part Beyond's Motion to Strike Summary Judgment Evidence, striking portions of the affidavits submitted in support of Paulsen's Response. (R. 1046-52).

On January 12, 1995, the District Court issued an order granting Beyond's Motion for Summary Judgment with respect to both of Paulsen's discrimination claims. (R. 1053-70). The District Court held that: (1) as to her claim of sex discrimination, Paulsen failed to create a fact issue that her discharge was motivated by discriminatory intent, and (2) as to her claim of disability discrimination, Paulsen failed to present direct evidence of discrimination, failed to create a fact issue that she qualified as a "disabled" person under the Americans

with Disabilities Act ("ADA"), and failed to create a fact issue that her discharge was motivated by discriminatory intent. (R. 1053-70). Final judgment was entered by the District Court on January 12, 1995. (R. 1071). Paulsen filed her Notice of Appeal on February 3, 1995. (R. 1072-73).

On June 18, 1996, the United States Court of Appeals for the Fifth Circuit affirmed summary judgment for Beyond, holding that: (1) as to her claim of sex discrimination, Paulsen failed to create a material fact issue that the reason for her termination was sex discrimination, and (2) as to her claim of disability discrimination, Paulsen failed to create a material fact issue that she was "disabled" under the ADA. (Petition App. A-1 - A-23). Paulsen filed her Petition for Writ of Certiorari on September 13, 1996.

B. Statement of Facts

Beyond objects to Paulsen's statement of facts because it fails to set forth all the facts material to consideration of the questions presented as required by Supreme Court Rule 14.1(g). Therefore, Beyond submits the following Statement of Facts:

Paulsen is a former employee of Beyond. At the time Paulsen was hired, Beyond was a start-up company involved in the manufacture, marketing and sale of electronic mail products. (R. 141-42). During her pre-employment interviews — including her interview with Beyond President Charles Digate — Paulsen informed Beyond that she had previously suffered from cancer, had undergone surgery and was unable to have children. (R. 113-15). However, Paulsen admits that she was not, and is not, disabled by her prior cancer and surgery. (R. 283).

In September of 1991, with full knowledge of Paulsen's prior cancer and surgery, Beyond hired Paulsen as a Regional Sales Manager in Dallas, Texas. (R. 121-22). As a Regional Sales Manager, Paulsen's job duties included sales and regional office responsibilities, generating an assigned quota of sales revenue, servicing and developing large accounts, and developing relationships with resellers of Beyond's products. (R. 122).

Throughout her entire employment with Beyond, Paulsen had significant performance problems. Specifically, Paulsen was criticized for her failure to meet her sales quota. In 1992, Paulsen was assigned a sales quota of $600,000. (R. 187-88, 434). It is undisputed that Paulsen failed to attain her 1992 quota. (R. 165-69). Moreover, Paulsen admits that she was criticized for low sales. (R. 168-69, 179-80).

Paulsen had numerous problems documenting and paying her business expenses. Paulsen was issued a corporate American Express card for charging her business expenses, but American Express cancelled the card shortly after its issuance because she failed to timely pay the bills. (R. 125-27). Paulsen was specifically criticized for having her American Express card cancelled. (R. 127-30).

In addition, Paulsen was required to submit written expense reports on a weekly basis. (R. 159, 161-62). However, Paulsen repeatedly failed to submit her expense reports timely, and she was criticized for this failure on at least two (2) occasions. (R. 162-63).

Paulsen's supervisors also required her to submit sales forecasts of pending sales prospects and potential future revenue on a monthly or semi-monthly basis. (R. 170-73). Paulsen was repeatedly criticized by her supervisors for untimely and inaccurate sales forecasts. (R. 173-76).

Furthermore, several customers complained to Beyond's management about Paulsen's demeanor and work performance. (R. 152-55, 517-18). Paulsen was also criticized for being unresponsive and not returning phone calls. (R. 147, 218).

Near the end of 1992, Mike Allen, Vice President of Sales, determined that Paulsen's job performance was unsatisfactory and recommended that she be replaced. (R. 511). However, Beyond's President Charles Digate refused to approve replacing Paulsen at that time due to her relationship with Texas Instruments, a potential customer. (R. 511).

In January of 1993, Paulsen assisted Beyond in closing a large sale to Texas Instruments. Paulsen was the only sales representative that received credit for the sale and, as a result, she exceeded her monthly sales quota for January of 1993. (R. 223-24). However, Paulsen did not achieve her monthly quota in any other month in 1993. (R. 224, 435-72). Furthermore, Paulsen's revenue attainment fell far below her projections in her monthly forecasts. (R. 285-87). Paulsen's revenue numbers steadily decreased after January of 1993, and she failed to attain her $77,000 monthly quota (*see* R. 443) in February and March of 1993 or her $83,000 monthly quota in April of 1993. (R. 473). Indeed, after January of 1993, Paulsen was second lowest among all Regional Sales Managers in revenue attainment. (R. 473).

As a result of Paulsen's continued unsatisfactory performance and her weak sales forecasts, in May of 1993 Mike Allen and Charles Digate decided to replace Paulsen. (R. 511-13). On June 18, 1993, Mike Allen engaged the services of a management recruiter, Mr. Craig Millard, to locate a replacement for Paulsen. (R. 521-22, 559-60, 569-71, 579). It is undisputed that, at the time the job search was commenced, Mike Allen specifically informed Mr. Millard that Beyond

wanted to replace Paulsen due to her lack of performance and customer credibility, and that Paulsen was to be discharged. (R. 569-70, 580, 782).

After initiating the job search for her replacement, on June 23, 1993, Mike Allen went to Dallas for a meeting with Paulsen. (R. 522, 290-92). During this meeting, Mike Allen discussed numerous shortcomings in Paulsen's performance. (R. 527-37, 546-47). Paulsen admits that Mr. Allen discussed her performance during this meeting. (R. 669-70).

Subsequently, on July 26, 1993, Mike Allen interviewed five prospective replacements for Paulsen. (R. 543-45, 565-67, 573-76, 583-87). On August 26, 1993, Roger Moore received an offer of employment. (R. 496).

In the meantime, Paulsen failed to meet her minimum level of monthly revenue attainment for June and July of 1993. (R. 294). However, in early August of 1993, Paulsen informed Beyond that she was severely ill and could not work. Paulsen does not recall physically reporting in to Beyond's office any time after August 5, 1993. (R. 295, 306). Despite the fact that Beyond had already found a replacement, Beyond decided not to discharge Paulsen at this time, due to her illness. (R. 496).

On September 10, 1993, Paulsen sent an e-mail message to Mike Allen, informing him that she was scheduled for surgery but that the surgery had to be postponed. This e-mail message provided no definite date for her return. (R. 311, 477).

Effective September 15, 1993, Mike Allen was demoted and replaced as Vice President of Sales, based upon his failure to meet minimum revenue requirements. Paul Guerin then assumed the position of Vice President and became Paulsen's supervisor. (R. 504-06, 599-600).

On September 17, 1993, Paulsen sent a letter to Jeff Kalowski, Beyond's CFO, inquiring about disability benefits. (R. 319-25, 478-84). This letter did not state when — or if — Paulsen would be returning to work. (R. 319-25, 478-84).

On September 30, 1993, Mike Allen and Lynn Paulsen had a telephone conversation concerning the status of Paulsen's business and her health. (R. 272). According to Paulsen, during this conversation, Mr. Allen stated: "You used to have cancer, didn't you? Aren't you afraid it's going to come back?" (R. 272).

On October 5, 1993, Beyond reached an agreement to employ Roger Moore as a Regional Sales Manager in Dallas, Texas. (R. 599-601). Paulsen learned of her impending replacement as a result of rumors from Beyond employees and an e-mail from an unidentified Beyond employee. (R. 328-29, 374).

On October 7, 1993, Paul Guerin telephoned Paulsen to determine her status. (R. 273, 275-76, 338-40, 598-99). During this conversation, Mr. Guerin expressed concern about Paulsen's condition, and allegedly asked about her prior cancer and if she was worried that it might recur. (R. 275-76). Mr. Guerin made this inquiry because Paulsen had previously indicated that she was not certain if her illness resulted from her prior cancer or from scar tissue resulting from her prior surgery. (R. 616-17).

On October 8, 1993, Paulsen confronted Paul Guerin about being replaced, and then informed him that she was feeling better and had been released to return to work. (R. 605). Subsequently, Mr. Guerin discussed Paulsen's status with Charles Digate. Mr. Guerin and Mr. Digate determined that,

rather than return Paulsen to her sales territory, the company should offer Paulsen a mutual separation agreement. (R. 605-06). The reasons for offering Paulsen a mutual separation agreement were her failure to meet her sales quota, her weak sales forecasts, her poor administrative skills, and her continued nonresponsiveness. (R. 497, 617-19).

On Sunday, October 10, 1994, Paulsen was informed of the company's decision. (R. 606, 353-58). Subsequently, Paulsen had several conversations with Beyond's management concerning the terms of her separation agreement, but no agreement could be reached. (R. 342, 560-62). Paulsen was never told that she was being discharged because she had cancer or because she may have cancer in the future. (R. 275).

Paulsen is aware of no other female employees of Beyond who were discriminated against because of their sex. (R. 268-89, 552). Moreover, in 1993, Beyond discharged four male employees for the same reasons that Paulsen was discharged.

Paulsen is aware of no other employees that Beyond discriminated against because of a disability. (R. 552). Moreover, Paulsen's replacement, Roger Moore, was never deposed, and no evidence was submitted concerning whether Mr. Moore was disabled. Furthermore, Paulsen offered no evidence concerning whether any of the other employees discharged for unsatisfactory performance and low sales were disabled. In addition, two other employees of Beyond — Mr. Mark Barrett and Mr. Thomas Fraser — missed extended work time due to illness or injury and were not discharged. (R. 262-67).

REASONS FOR DENYING THE WRIT

Supreme Court Rule 10 provides that "[a] petition for writ of certiorari will be granted only for compelling reasons."

There are no compelling reasons for granting this Petition on any of the issues raised by Petitioner. Although not an exhaustive list of the reasons for granting certiorari, Rule 10 lists three characteristics of cases justifying review. Petitioner's case meets none of these criteria. Furthermore, Petitioner's asserted errors consist essentially of factual disputes or involve the application of properly stated rules of law, which are not errors warranting review by the Supreme Court.

I.

PETITIONER'S CLAIM OF DISABILITY DISCRIMINATION DOES NOT MERIT REVIEW BY THE SUPREME COURT.

A. The Fifth Circuit's decision is consistent with Supreme Court precedent and the applicable statutes and regulations.

Paulsen's claim that the Fifth Circuit's decision conflicts with this Court's decision in *School Board of Nassau County, Fla. v. Arline*, 408 U.S. 273, 107 S. Ct. 1123, 94 L. Ed. 2d 307 (1987), is incorrect. The Court in *Arline* held that a person suffering from tuberculosis can be a handicapped person under the Rehabilitation Act of 1973. 408 U.S. at 281, 107 S. Ct. at 1127. Although *Arline* indicated, as Paulsen notes, that a person could be a handicapped individual under the Rehabilitation Act if he or she is regarded as having an impairment (such as cancer) that substantially limits a major life activity (such as working), 408 U.S. at 282-83 & n.10; 107 S. Ct. at 1128-29 & n.10, *Arline* did not address what evidence is sufficient to raise a fact issue that an individual is regarded as having an impairment that substantially limits a major life activity, under either the Rehabilitation Act or the ADA. Thus, *Arline* did not address the

issue that was before the Fifth Circuit. However, in accordance with *Arline*, the Fifth Circuit correctly recognized that Paulsen would be "disabled" under the ADA if she could show that Beyond regarded her as having cancer that substantially limited her in the major life activity of working. The Fifth Circuit properly held, however, that Paulsen must actually present sufficient evidence to create a fact issue that Beyond regarded her as having cancer that substantially limited her in the major life activity of working, a requirement this Court did not dispense with in *Arline*.

The Fifth Circuit's holding is consistent with the ADA and its regulations. Although cancer may be an "impairment" under the ADA, to establish that one is "disabled" one must show that the impairment *substantially limits* a *major life activity*. 42 U.S.C. § 12102(2); *see Ellison v. Software Spectrum, Inc.*, 85 F.3d 187 (5th Cir. 1996) (holding that plaintiff with cancer nonetheless failed to create a fact issue that she was "disabled" under the ADA); *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 (5th Cir. 1995). Because Paulsen does not contend that she actually has an impairment (*i.e.*, cancer), she had to create a material fact issue that Beyond treated her as having a substantially limiting impairment — that is, that Beyond treated her as if she were suffering a recurrence of cancer that substantially limited a major life activity. 42 U.S.C. § 12102(2)(C); 29 C.F.R. § 1630.2(l)(3). Paulsen does not dispute that this is the requirement she had to meet.

Neither the summary judgment evidence relied on by Paulsen, nor anything else in the summary judgment record, raises a fact issue that Beyond treated Paulsen as having a recurrence of cancer, or that the supposed recurrence of cancer *substantially limited* the major life activity of working. Although the ADA does not define "substantially limits," the EEOC's regulations provide significant guidance. In

determining whether an impairment "substantially limits" a major life activity one must consider: "(i) The nature and severity of the impairment; (ii) The duration or expected duration of the impairment; and (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." 29 C.F.R. § 1630.2(j)(2). With respect to the major life activity of "working," the regulations state:

> The term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j)(3)(i). The regulations also state that in determining whether someone is substantially limited in the major life activity of working, one must also consider the geographic area to which the person has access and the number and types of jobs in that geographical area from which the person is also disqualified because of the impairment. 29 C.F.R. § 1630.2(j)(3)(ii). Clearly, the ADA and the regulations require far more than merely showing that an individual's ability to work is affected to establish that the major life activity of working is *substantially limited*. *Ellison*, 85 F.3d at 191 ("Obviously, her ability to work was affected; but, as reflected in the above-quoted statute and regulations, far more is required to trigger coverage under § 12102(2)(A).").

Paulsen failed to produce any summary judgment evidence as to what Beyond perceived to be the nature and severity of her

supposed recurrence of cancer, what Beyond perceived to be its duration or expected duration, or whether Beyond perceived it to have a permanent or long term impact. Nor did Paulsen produce any evidence that Beyond perceived her to be significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities, as opposed to merely being unable to perform one particular job.

Paulsen contends that Paul Guerin believed she was too sick to return to work, and such a belief creates a fact issue that Beyond treated her possible recurrence of cancer as substantially limiting a major life activity. Although Paulsen does not point out in her Petition what portions of Guerin's deposition indicate that he believed Paulsen was too sick to return to work, a review of Guerin's deposition does not reveal any probative evidence that Guerin believed Paulsen was unable to return to work because she was having a recurrence of cancer or that he therefore believed she was substantially limited in the major life activity of working. In his deposition, Guerin indicated that *while Paulsen was out on disability leave* he did not know when she would be able to return to work, but that he did not anticipate she would be able to return for an undetermined period of time based on information that Paulsen and Mike Allen had given him. However, as the Fifth Circuit correctly indicated, even if Guerin believed Paulsen was presently unable to return to work, there is no evidence that he believed Paulsen was suffering from a recurrence of the cancer she had prior to her employment with Beyond, nor is there any evidence that Beyond appreciated the gravity of her prior cancer such that Beyond believed it to have substantially limited the major life activity of working. (Petition App. A-22).

Paulsen's reliance on Guerin's vague and nonspecific

belief at one point (while Paulsen was on disability leave) that she would be unable to return to work at the present time is not the type of specific factual evidence required to raise a genuine issue of material fact that she was substantially limited in the major life activity of working. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986) (stating that the nonmovant must do more than show some metaphysical doubt as to the material facts, but must come forward with specific facts); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986) (stating that evidence that is "merely colorable," or "not significantly probative," is insufficient to create a material fact issue).

Paulsen ignores the undisputed summary judgment evidence establishing that Beyond neither regarded her as being disabled nor discharged her because it regarded her as being disabled. In her Petition Paulsen relies solely on one isolated portion of the summary judgment evidence, and takes that evidence out of context in an attempt to argue that she has created a material fact issue. However, in determining whether a genuine issue of material fact exists courts must consider the entire summary judgment record, and cannot consider isolated portions of evidence out of context. *Davis v. Chevron U.S.A., Inc.*, 14 F.3d 1082, 1086 (5th Cir. 1994); *Thomas v. N.A. Chase Manhattan Bank*, 994 F.2d 236, 241 (5th Cir. 1993); *see also Matsushita*, 475 U.S. at 587, 106 S. Ct. at 1356 (indicating that courts must consider the record taken as a whole, and must consider evidence in its factual context, rather than in isolation, in determining whether there is a genuine issue for trial).

It is undisputed that, prior to her discharge, Paulsen informed Beyond she was healthy and ready to return to work. This evidence indicates that Beyond regarded Paulsen as healthy — not disabled — at the time of her discharge. Indeed,

there is no evidence suggesting that Beyond did not regard Paulsen as healthy and able to work after she so informed Guerin, or that Beyond had any reason to perceive her as anything but healthy and able to work. Thus, the only reasonable inference is that at the time of her discharge Beyond believed Paulsen to be healthy and able to work. The undisputed summary judgment evidence also shows that Beyond's management — including its president, Charles Digate — was aware of Paulsen's history of cancer prior to hiring her, and that Paulsen actually emphasized her prior cancer in her interview. This undisputed evidence creates an inference that Beyond did not later discharge Paulsen on the basis of her prior cancer or a recurrence thereof, real or perceived. *Tyndall v. National Education Centers, Inc.*, 31 F.3d 209, 215 (4th Cir. 1994).

Although Paulsen cites on two alleged inquiries by Guerin and Mike Allen concerning her illness, these inquiries were properly held by the District Court to constitute nothing more than legitimate inquiries into Paulsen's general welfare, which do not raise an inference of discrimination. *See Tyndall*, 31 F.3d at 215. To the extent the inquiries were anything other than expressions of personal concern, they were clearly designed to serve a legitimate business purpose (*i.e.*, to determine when, or if, Paulsen would be available to return to work), as they were made at about the time Paulsen was seeking disability benefits but had not indicated when she might be able to return to work. And, as the District Court correctly noted, no discriminatory intent can be inferred since neither Allen nor Guerin made any further inquiries into Paulsen's condition and made no statements whatsoever concerning whether Paulsen could or should continue working with her condition. (Petition App. A-48).

The evidence relied on by Paulsen in her Petition — that Guerin allegedly believed her to be too sick to work — when

considered in the context of the undisputed summary judgment evidence taken as a whole, fails to create a fact issue that Beyond terminated Paulsen because it regarded her as having an impairment that substantially limited a major life activity. As the Fifth Circuit correctly stated, "Paulsen simply does not establish . . . in what way Beyond treated Paulsen as if she suffered from any illness that had the requisite limiting effects to trigger ADA coverage." (Petition App. A-22). Because there is an absolute paucity of specific facts showing that Beyond regarded Paulsen as having a recurrence of cancer that substantially limited a major life activity, the Fifth Circuit properly affirmed summary judgment for Beyond consistent with the ADA and the regulations thereunder.

B. The Fifth Circuit's decision does not conflict with the decisions of other Courts of Appeals.

The Fifth Circuit's decision is consistent with decisions of other courts of appeals as well as other decisions of the Fifth Circuit. *See, e.g., MacDonald v. Delta Air Lines, Inc.*, 94 F.3d 1437 (10th Cir. 1996); *Kelly v. Drexel University*, 94 F.3d 102, 108-09 (3d Cir. 1996); *Rogers v. International Marine Terminals, Inc.*, 87 F.3d 755, 760 (5th Cir. 1996); *Ray v. Glidden Co.*, 85 F.3d 227, 229-30 (5th Cir. 1996); *Ellison*, 85 F.3d at 192-93; *Wooten v. Farmland Foods*, 58 F.3d 382, 385-86 (8th Cir. 1995); *Dutcher*, 53 F.3d at 726-27; *Hamm v. Runyon*, 51 F.3d 721, 724-26 (7th Cir. 1995); *Bolton v. Scrivner, Inc.*, 36 F.3d 939, 942-44 (10th Cir. 1994), *cert. denied*, __ U.S. __, 115 S. Ct. 1104, 130 L. Ed. 2d 1071 (1995); *Forrisi v. Bowen*, 794 F.2d 931, 934-35 (4th Cir. 1986). The courts in each of these cases affirmed summary judgment for the defendant on the ground that the plaintiff failed to create a fact issue that he or she was regarded as having an impairment that substantially limited a major life activity, as required under the applicable statutes and regulations.

The decision below does not conflict with *Taylor v. United States Postal Service*, 946 F.2d 1214 (6th Cir. 1991), cited by Paulsen in her Petition. In *Taylor*, the evidence showed that in refusing to hire Taylor as a distribution clerk, the United States Postal Service believed, based on the results of a medical exam conducted by the Postal Service, that he would be physically unable to perform the required job activities due to degenerative disease in his back and knees. *Id.* at 1214-15. The Sixth Circuit held the evidence established that the Postal Service regarded Taylor as having an impairment that substantially limited his ability to work. *Id.* at 1218. Paulsen, unlike Taylor, failed to present evidence sufficient to support a finding that Beyond believed her to have an impairment (*i.e.*, cancer) that substantially limited her ability to work. The different results in this case and in *Taylor* are due to dissimilar facts, not to conflicting interpretations of the applicable law.

C. Petitioner's asserted errors do not warrant review by the Supreme Court.

In addition, to the extent Paulsen's assertion of error has any validity (which Beyond denies), such error concerns what are essentially factual disputes (*i.e.*, the inferences to be drawn from the summary judgment evidence) or the misapplication of a properly stated rule of law (*i.e.*, the standard for coverage under the ADA). These types of asserted error rarely warrant review by this Court under Supreme Court Rule 10.

II.

PETITIONER'S CLAIM OF SEX DISCRIMINATION DOES NOT MERIT REVIEW BY THE SUPREME COURT.

A. The Fifth Circuit's decision is consistent with *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993), and is not in substantial conflict with decisions of other courts of appeals.

Paulsen argues in her Petition that the Fifth Circuit, by relying on its previous opinion in *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955 (5th Cir. 1994), misapplied this Court's opinion in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L. Ed. 2d 407 (1993). The Fifth Circuit, both in *Bodenheimer* and as further explained in *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996) (en banc), correctly understood and applied *Hicks*. Likewise, the Fifth Circuit's opinion below is consistent with *Hicks*.

Despite Paulsen's contention to the contrary the decision below does not conflict with *Hicks* because this Court in *Hicks* did not address the issue raised by Paulsen. The Court in *Hicks* held that a Title VII plaintiff is not entitled to judgment as a matter of law simply because she proves her prima facie case and then shows that the employer's proffered reasons for her discharge are false. *Hicks*, 113 S.Ct. at 2746. However, the Court did not address whether a plaintiff would always be able to avoid summary judgment for the employer if, in addition to the prima facie case, the evidence is sufficient to allow the jury to disbelieve the employer's proffered reasons for the adverse employment action. That question simply was not before the Court in *Hicks*. Indeed, the *Hicks* case had been fully tried before the district judge. Thus, in reviewing the District Court's

judgment, this Court in *Hicks* did not rule, nor did it have the opportunity to rule, on the application of Rule 56 (summary judgment) or Rule 50 (judgment as a matter of law in jury trials) in employment discrimination cases. The Fifth Circuit in *Bodenheimer* (Rule 56 motion for summary judgment) and in *Rhodes* (Rule 50 motion for judgment as a matter of law) squarely addressed the issue raised by Paulsen and correctly resolved it consistent with this Court's precedents. Therefore, Paulsen's contention that the Fifth Circuit's decision below conflicts with this Court's decision in *Hicks*, and that *Hicks* necessarily precludes summary judgment for Beyond, is incorrect and, to say the least, disingenuous.

To the contrary, *Bodenheimer*, *Rhodes*, and the Fifth Circuit in this case correctly applied the standards governing motions for summary judgment and motions for judgment as a matter of law to employment discrimination cases. As explained in *Hicks*, once the employer has met its burden of articulating legitimate, non-discriminatory reasons for the employment action, which Paulsen has not challenged that Beyond has done in this case, the plaintiff then bears the burden of proving that the employer's proffered reason was a "pretext for discrimination" — that is, the plaintiff must show "*both* that the reason was false, *and* that discrimination was the real reason." *Hicks*, 113 S. Ct. at 2751.

Although *Hicks* was addressing a Title VII plaintiff's ultimate burden of proof at trial, *Hicks* is instructive here because it is the plaintiff's ultimate burden at trial that necessarily defines the scope of the inquiry at the summary judgment stage. As this Court explained in *Celotex Corp. v. Catrett*, "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's

case, and on which that party will bear the burden of proof at trial." 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986). Because Paulsen's burden at trial would be to prove *both* that Beyond's proffered reasons were false *and* that sex discrimination was the real reason, in order to avoid summary judgment she must make a showing sufficient to establish, not only that Beyond's reasons were false, but *also* that Beyond intentionally discriminated against her because of her sex. This is exactly what the Fifth Circuit in *Bodenheimer*, *Rhodes*, and in this case below held, and this required showing is consistent with, and indeed compelled by, *Hicks* and prior Supreme Court precedents.

Paulsen would apparently interpret *Hicks* to mean that, in *all* cases, rejection of the employer's proffered reasons for the employment action will *always* support a finding of intentional discrimination, and consequently that raising a fact issue as to the employer's proffered reasons will, in *all* cases, preclude summary judgment against the plaintiff. The more reasonable interpretation of *Hicks* is the one adopted by the Fifth Circuit. The Fifth Circuit in *Rhodes*, an age discrimination case, correctly explained the appropriate standard for considering motions for summary judgment or judgment as a matter of law in employment discrimination cases:

> In tandem with a prima facie case, the evidence allowing rejection of the employer's proffered reasons will often, perhaps usually, permit a finding of discrimination without additional evidence. Thus, a jury issue will be presented and a plaintiff can avoid summary judgment and judgment as a matter of law if the evidence taken as a whole (1) creates a fact issue as to whether each of the employer's stated

> reasons was what actually motivated the employer and (2) creates a reasonable inference that age was a determinative factor in the actions of which plaintiff complains. The employer, of course, will be entitled to summary judgment if the evidence taken as a whole would not allow a jury to infer that the actual reason for the discharge was discriminatory.

Rhodes, 75 F.3d at 994; *see also Bodenheimer*, 5 F.3d at 957-59. The Fifth Circuit's standard is substantially in line with that of other courts of appeals. *See, e.g., Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, __ F.3d __, 1996 WL 531799, *4-7 (11th Cir. Sept. 19, 1996); *Theard v. Glaxo, Inc.*, 47 F.3d 676, 680 (4th Cir. 1995); *Smith v. Stratus Computer, Inc.*, 40 F.3d 11, 16 (1st Cir. 1994), *cert. denied*, __ U.S. __, 115 S. Ct. 1958, 131 L. Ed. 2d 850 (1995); *Woods v. Friction Materials, Inc.*, 30 F.3d 255, 260-61 n. 3 (1st Cir. 1994); *Nelson v. Boatmen's Bancshares, Inc.*, 26 F.3d 796, 801 (8th Cir. 1994).

The Fifth Circuit's standard does not, as Paulsen apparently suggests, conflict with *Hicks*. By stating that disbelief of the employer's explanation *may* be enough to support a finding of discrimination, *Hicks* also implies that such disbelief *may not* be enough. *See Hicks*, 113 S.Ct. at 2749; *see also Isenbergh*, __ F.3d at __, 1996 WL 531799, *5 (stating that *Hicks* indicates "that disbelief of the employer's proffered reason may (and by implication, may not) be enough for a plaintiff to overcome an employer's motion for judgment as a matter of law"). Properly read, *Hicks* "strongly suggest[s] that rejecting the employer's proffered reason is not always sufficient to allow a finding of discrimination, although sometimes . . . it might be." *Isenbergh*, __ F.3d at __, 1996 WL 531799, *5; *see also Woods*, 30 F.3d at 261 n.3 ("[W]e do not

think that the Supreme Court meant to say that such a finding [of discrimination] would *always* be permissible.").

In *Rhodes*, the Fifth Circuit correctly recognized that there may be cases in which "the evidence put forth by the plaintiff to establish the prima facie case and to rebut the employer's reasons is not substantial," and consequently "a jury cannot reasonably infer discriminatory intent." *Rhodes*, 75 F.3d at 994. *See also* Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 Mich. L. Rev. 2229, 2308 (1995) ("There may be cases in which the [prima facie case and proof of pretext] goes the plaintiff's way, but a judgment for the plaintiff would still be legally questionable."). Whether or not summary judgment is appropriate will necessarily depend on the evidence in each individual case. *See Rhodes*, 75 F.3d at 994 ("The evidence necessary to support an inference of discrimination will vary from case to case."); *Woods*, 30 F.3d at 261 n.3 ("The strength of the prima facie case and the significance of the disbelieved pretext will vary from case to case depending on the circumstances. In short, everything depends on the individual facts.").

The interpretation of *Hicks* urged by Paulsen would create a categorical rule that an employer would never be entitled to summary judgment if the evidence is sufficient to allow the jury to disbelieve the employer's explanation for the employment action. Such a rule would in effect be an abrogation of Rule 50 (regarding judgments as a matter of law) and Rule 56 (regarding summary judgments). However, this Court has repeatedly held that courts should not treat discrimination differently from other ultimate questions of fact. *See, e.g.*, *Hicks*, 113 S. Ct. at 2756; *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716, 103 S. Ct. 1478, 1482, 75 L. Ed. 2d 403 (1983); *see also* Malamud, 93 Mich. L. Rev. at 2305 (stating that "the Court stressed in *Hicks* that once a *McDonnell*

Douglas–Burdine case reaches the pretext stage, it is to be treated like any other civil case"). Paulsen's suggested interpretation of *Hicks* would entirely remove employment discrimination cases from the traditional application of Rule 50 and Rule 56, which would certainly be an unintended result of the *Hicks* opinion. *See Isenbergh*, __ F.3d at __, 1996 WL 531799, *7 ("[W]e are skeptical that the Supreme Court intended to remove an entire category of cases from traditional consideration under Fed.R.Civ.P. 50 or 56."). The more sensible interpretation of *Hicks* is one that preserves the traditional rules applicable to civil cases generally. *See Rhodes*, 75 F.3d at 993 ("[T]he question does not yield a categorical answer. . . . The answer lies in our traditional sufficiency-of-the-evidence analysis."); *Isenbergh*, __ F.3d at __, 1996 WL 531799, *7.

For the reasons set forth above, the Fifth Circuit's decision, requiring Paulsen to create a material fact issue that Beyond's explanation for her discharge was false and that Beyond's true motivation was unlawful discrimination, is consistent with *Hicks* and is not in substantial conflict with decisions of other Courts of Appeals.

B. This case does not merit review because Respondent is entitled to summary judgment even under the standard urged by Petitioner.

Even if the Fifth Circuit were incorrect in requiring Paulsen to create a fact issue that the real reason for her discharge was sex discrimination, Beyond is nonetheless entitled to summary judgment because Paulsen has failed to raise a fact issue that Beyond's articulated reasons for her discharge were false.

Beyond's reasons for discharging Paulsen included: (1) her

failure to attain her sales quotas; (2) her allowing her corporate American Express card to be cancelled for failing to pay the bills; (3) her failure to timely submit weekly expense reports; (4) her failure to accurately and timely submit sales forecasts; (5) her inaccessibility to customers and supervisors; (6) her failure to return telephone calls; and (7) complaints about Paulsen from customers. Beyond presented substantial evidence supporting its nondiscriminatory reasons for discharging Paulsen. Paulsen did not present sufficient evidence to create a factual issue as to the truthfulness of Beyond's articulated reasons for her discharge. Most of the evidence establishing Paulsen's unsatisfactory performance and low sales was not even addressed — much less disputed — by Paulsen. Under any formulation of pretext, Paulsen cannot establish that her discharge was for anything else other than unsatisfactory performance and low sales. Thus, the issue raised by Paulsen in her Petition pertaining to the propriety of the Fifth Circuit's reliance on its decisions in *Bodenheimer* and *Rhodes* is a purely academic one and is not dispositive of this case. Paulsen's Petition should therefore be denied.

CONCLUSION

For the reasons set forth herein, this Court should deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A — RELEVANT REGULATIONS

29 C.F.R. § 1630.2(l)(3) provides as follows:

> *Is regarded as having such an impairment* means:
>
> Has none of the impairments defined in paragraph (h)(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

29 C.F.R. § 1630.2(j)(2) provides as follows:

> The following factors should be considered in determining whether an individual is substantially limited in a major life activity:
>
> (i) The nature and severity of the impairment;
>
> (ii) The duration or expected duration of the impairment; and
>
> (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

29 C.F.R. § 1630.2(j)(3) provides as follows:

> With respect to the major life activity of *working*—

Appendix A

(i) The term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working":

(A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the

number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).